

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 07, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CORY P.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,²
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:21-CV-00016-LRS

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 13, 14. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Christopher H. Dellert. Defendant is represented by Special Assistant United States Attorney Franco L. Becia. The

¹ Plaintiff's last initial is used to protect his privacy.

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. The Court therefore substitutes Kilolo Kijakazi as the Defendant and directs the Clerk to update the docket sheet.

1 Court, having reviewed the administrative record and the parties' briefing, is fully
2 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 13, is
3 denied and Defendant's Motion, ECF No. 14, is granted.

4 **JURISDICTION**

5 Cory P. (Plaintiff) filed for disability insurance benefits on August 15, 2016,
6 and for supplemental security income on August 17, 2016, alleging in both
7 applications an onset date of February 1, 2015. Tr. 203-10. Benefits were denied
8 initially, Tr. 125-33, and upon reconsideration, Tr. 136-49. Plaintiff appeared at a
9 hearing before an administrative law judge (ALJ) on June 13, 2018. Tr. 37-72. On
10 September 14, 2018, the ALJ issued an unfavorable decision, Tr. 18-36, and on
11 August 1, 2019, the Appeals Council denied review. Tr. 7-12. The matter is now
12 before this Court pursuant to 42 U.S.C. § 405(g).

13 **BACKGROUND**

14 The facts of the case are set forth in the administrative hearing and transcripts,
15 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are
16 therefore only summarized here.

17 Plaintiff was born in 1983 and was 34 years old at the time of the hearing. Tr.
18 43. He has a GED. Tr. 43. He last worked in 2015 loading trucks and stacking
19 boxes. Tr. 43. He also has work experience in roofing and fencing, on an assembly
20 line, and as a forklift driver. He was diagnosed with anxiety and panic disorder
21 when he felt like he was having a heart attack and wanted to stay home and avoid
people. Tr. 43-44. His symptoms included fuzziness in the head, chest pains, going

1 stiff and numb at the same time, and an overwhelming feeling of the need to stop
2 what he was doing. Tr. 47. When he has a severe panic attack, it feels like
3 “everything’s closing in” and as though he cannot breathe. Tr. 48. He also has less
4 severe panic attacks which involve the feeling of wanting to get outside and away
5 from people. Tr. 49. Any time he has a panic attack he feels drained and fatigued.
6 Tr. 52-53.

7 STANDARD OF REVIEW

8 A district court’s review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner’s decision will be disturbed “only if it is not supported by
11 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158
12 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable
13 mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and
14 citation omitted). Stated differently, substantial evidence equates to “more than a
15 mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted).
16 In determining whether the standard has been satisfied, a reviewing court must
17 consider the entire record as a whole rather than searching for supporting evidence in
18 isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
21 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
rational interpretation, [the court] must uphold the ALJ’s findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s
3 decision on account of an error that is harmless.” *Id.* An error is harmless “where it
4 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
5 (quotation and citation omitted). The party appealing the ALJ’s decision generally
6 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
7 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within the
10 meaning of the Social Security Act. First, the claimant must be “unable to engage in
11 any substantial gainful activity by reason of any medically determinable physical or
12 mental impairment which can be expected to result in death or which has lasted or
13 can be expected to last for a continuous period of not less than twelve months.” 42
14 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must
15 be “of such severity that he is not only unable to do his previous work[,], but cannot,
16 considering his age, education, and work experience, engage in any other kind of
17 substantial gainful work which exists in the national economy.” 42 U.S.C. §§
18 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to determine
20 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-
21 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is

1 engaged in “substantial gainful activity,” the Commissioner must find that the
2 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
6 claimant suffers from “any impairment or combination of impairments which
7 significantly limits [his or her] physical or mental ability to do basic work
8 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
9 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
10 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
11 §§ 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant’s impairment to
13 severe impairments recognized by the Commissioner to be so severe as to preclude a
14 person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe
16 than one of the enumerated impairments, the Commissioner must find the claimant
17 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant’s impairment does not meet or exceed the
19 severity of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (RFC),
21 defined generally as the claimant’s ability to perform physical and mental work
activities on a sustained basis despite his or her limitations, 20 C.F.R. §§

1 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in the
5 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
6 claimant is capable of performing past relevant work, the Commissioner must find
7 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
8 claimant is incapable of performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner should conclude whether, in view of the
10 claimant's RFC, the claimant is capable of performing other work in the national
11 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this
12 determination, the Commissioner must also consider vocational factors such as the
13 claimant's age, education, and past work experience. 20 C.F.R. §§
14 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other
15 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
16 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
17 work, analysis concludes with a finding that the claimant is disabled and is therefore
18 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

19 The claimant bears the burden of proof at steps one through four above.
20 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
21 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
capable of performing other work; and (2) such work "exists in significant numbers

1 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
2 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

3 **ALJ’S FINDINGS**

4 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
5 activity since February 1, 2015, the alleged onset date. Tr. 23. At step two, the ALJ
6 found that Plaintiff has the following severe impairments: anxiety disorders
7 (variously described as generalized anxiety disorder, panic disorder, and social
8 phobia) and cannabis use disorder. Tr. 24. At step three, the ALJ found that
9 Plaintiff does not have an impairment or combination of impairments that meets or
10 medically equals the severity of a listed impairment. Tr. 24.

11 The ALJ then found that Plaintiff has the residual functional capacity to
12 perform a full range of work at all exertional levels with the following nonexertional
13 limitations:

14 he can understand, remember, and carry out simple, as well as detailed
15 tasks; he should not work with the public; he can work with a small
16 group of co-workers and have superficial interactions with co-workers
and supervisors, but should work independently and not on team or
tandem tasks.

17 Tr. 26.

18 At step four, the ALJ found that Plaintiff is able to perform past relevant
19 work. Tr. 30. Alternatively, at step five, after considering the testimony of a
20 vocational expert and Plaintiff’s age, education, work experience, and residual
21 functional capacity, the ALJ found that there are jobs that existed in significant
numbers in the national economy that Plaintiff can perform such as automobile

1 detailer, warehouse worker, and industrial cleaner. Tr. 31. Thus, the ALJ concluded
 2 that Plaintiff has not been under a disability, as defined in the Social Security Act,
 3 from February 1, 2015, the alleged onset date, through the date of the decision. Tr.
 4 31.

5 **ISSUES**

6 Plaintiff seeks judicial review of the Commissioner's final decision denying
 7 disability income benefits under Title II and supplemental security income under
 8 Title XVI of the Social Security Act. ECF No. 13. Plaintiff raises the following
 9 issues for review:

- 10 1. Whether the ALJ evaluated Plaintiff's symptom claims;
- 11 2. Whether the ALJ properly considered lay witness testimony; and
- 12 3. Whether the ALJ properly evaluated the medical opinion evidence.

13 ECF No. 13 at 2.

14 **DISCUSSION**

15 **A. Symptom Claims**

16 Plaintiff contends the ALJ improperly rejected his symptom claims. ECF No.
 17 12 at 11-20. An ALJ engages in a two-step analysis to determine whether a
 18 claimant's testimony regarding subjective pain or symptoms is credible. "First, the
 19 ALJ must determine whether there is objective medical evidence of an underlying
 20 impairment which could reasonably be expected to produce the pain or other
 21 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).

"The claimant is not required to show that her impairment could reasonably be

1 expected to cause the severity of the symptom she has alleged; she need only show
2 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*
3 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
8 citations and quotations omitted). “General findings are insufficient; rather, the ALJ
9 must identify what testimony is not credible and what evidence undermines the
10 claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (1995)); *see*
11 *also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make
12 a credibility determination with findings sufficiently specific to permit the court to
13 conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The
14 clear and convincing [evidence] standard is the most demanding required in Social
15 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting
16 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

17 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*
18 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
19 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
20 daily living activities; (4) the claimant’s work record; and (5) testimony from
21 physicians or third parties concerning the nature, severity, and effect of the
claimant’s condition. *Thomas*, 278 F.3d at 958-59.

1 First, the ALJ found that Plaintiff's symptoms did not appear to significantly
2 interfere with functioning even at the earliest stages. Tr. 27. The ALJ observed
3 that Plaintiff reported anxiety symptoms began about a year and a half before his
4 alleged onset date and cited some findings from the first exam after his alleged
5 onset date in March 2015. Tr. 27, 304-306, 308. Plaintiff argues the ALJ
6 selectively cited the record and did not note that Plaintiff reported functioning was
7 difficult, and that his provider observed that he was depressed and exhibited poor
8 insight and judgment. ECF No. 13 at 7 (citing Tr. 303-04). Plaintiff is correct that
9 the ALJ did not mention findings that Plaintiff presented as anxious and fearful,
10 had obsessive thoughts, had poor insight, exhibited poor judgment, did not
11 demonstrate appropriate mood or affect, and appeared depressed. Tr. 304. To the
12 extent the ALJ minimized or overlooked these findings, the ALJ erred. However,
13 this error is harmless because the ALJ gave additional reasons, supported by
14 substantial evidence, for discrediting Plaintiff's symptom complaints. *See*
15 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008);
16 *Molina*, 674 F.3d at 1115 ("[S]everal of our cases have held that an ALJ's error
17 was harmless where the ALJ provided one or more invalid reasons for disbelieving
18 a claimant's testimony, but also provided valid reasons that were supported by the
19 record."); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir.
20 2004) (holding that any error the ALJ committed in asserting one impermissible
21 reason for claimant's lack of credibility did not negate the validity of the ALJ's
ultimate conclusion that the claimant's testimony was not credible).

1 Second, the ALJ found that Plaintiff's symptoms improved quickly with
2 treatment. Tr. 27. The effectiveness of treatment is a relevant factor in determining
3 the severity of a claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3)
4 (2011); *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006)
5 (determining that conditions effectively controlled with medication are not disabling
6 for purposes of determining eligibility for benefits); *Tommasetti v. Astrue*, 533 F.3d
7 1035, 1040 (9th Cir. 2008) (recognizing that a favorable response to treatment can
8 undermine a claimant's complaints of debilitating pain or other severe limitations).
9 The ALJ noted that in April 2015, Plaintiff reported his anxiety symptoms were
10 relieved with medication. Tr. 27, 294. The next day his primary care provider
11 found he was "doing much better" on medication and on exam he denied anhedonia,
12 was not anxious, was not in denial, denied hopelessness, reported no mood swings,
13 and did not have pressured speech. Tr. 301. The ALJ also noted other signs of
14 improvement in July 2015 when his therapist noted that Plaintiff had recently
15 challenged himself by going to Seattle with his girlfriend and planning a trip to
16 California for a wedding later that year. Tr. 27, 291. The ALJ that concluded such
17 quick improvement with medication does not support disabling mental symptoms.
18 Tr. 27.

19 Plaintiff argues the ALJ's analysis of his improvement with medication
20 "focused on symptoms that he had not alleged" and that he never alleged constantly
21 experiencing anxiety or panic attacks. ECF No. 13 at 8. Plaintiff's suggestion that
his symptoms "waxed and waned" is not contradicted by the ALJ's findings nor

1 does it undermine the ALJ's conclusion that the record reflects Plaintiff's symptoms
 2 improved with treatment. "Symptoms may wax and wane during the progression of
 3 a mental disorder. Those symptoms, however, may also subside during treatment. . .
 4 . Such evidence of medical treatment successfully relieving symptoms can
 5 undermine a claim of disability." *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th
 6 Cir. 2017) (citing *Garrison*, 759 F.3d at 1017). This is a clear and convincing
 7 reason supported by substantial evidence.

8 Third, the ALJ found that Plaintiff's complaints were largely situational. Tr.
 9 27. If a claimant suffers from limitations that are transient and result from
 10 situational stressors, as opposed to resulting from a medical impairment, an ALJ
 11 may properly consider this fact in discounting Plaintiff's symptom claims. *See*
 12 *Chesler v. Colvin*, 649 F. App'x 631, 632 (9th Cir. 2016) (concluding symptom
 13 testimony properly rejected in part because "the record support[ed] the ALJ's
 14 conclusion that [plaintiff's] mental health symptoms were situational").³ The ALJ

15
 16 ³ *See also Kimberlee L. v. Comm'r of Soc. Sec. Admin.*, No. 2:18-CV-00236-MKD,
 17 2019 WL 2251824, at *9 (E.D. Wash. May 9, 2019), *report and recommendation*
 18 *adopted sub nom. Kimberlee Anne L. v. Comm'r of Soc. Sec. Admin.*, No. 2:18-CV-
 19 236-RMP, 2019 WL 2250279 (E.D. Wash. May 24, 2019); *Brendan J. G. v.*
 20 *Comm'r, Soc. Sec. Admin.*, No. 6:17-CV-742-SI, 2018 WL 3090200, at *7 (D. Or.
 21 June 20, 2018); *Rys v. Berryhill*, No. CV 16-8391-JPR, 2018 WL 507207, at *15
 (C.D. Cal. Jan. 19, 2018); *Menchaca v. Comm'r, of Soc. Sec. Admin.*, No. 6:15-cv-

1 noted that throughout 2015, Plaintiff's complaints about symptoms related to things
2 like aggravating neighbors and financial worries. Tr. 27, 289-90, 306; *see also* Tr.
3 297, 378-79. For example, one record cited by the ALJ indicates, "He states he has
4 been having more panic attacks since last session; he was angry about neighbors and
5 has been feeling better since they finally moved and panic attacks stopped." Tr. 289.
6 The AL reasonably concluded that mental symptoms related to such situational
7 complaints are not disabling.

8 Plaintiff appears to argue that the ALJ's analysis of situational stressors
9 ignores the baseline level of Plaintiff's anxiety that was reduced by not working and
10 staying home. ECF No. 13 at 8. However, the ALJ did not find that Plaintiff has no
11 anxiety, only that the severity of the symptoms alleged is not supported by the
12 record. Tr. 27. The ALJ found anxiety disorder is a severe impairment and included
13 nonexertional limitations in the RFC finding to account for Plaintiff's mental health
14 symptoms. Tr. 24, 26. The ALJ's analysis of situational stressors takes into account
15 evidence in the medical record which is not contradicted by Plaintiff's argument.
16 This is a clear and convincing reasons supported by substantial evidence.

17 _____
18 01470–HZ, 2016 WL 8677320, at *7 (D. Or. Oct. 7, 2016); *Oraivej v. Colvin*, No.
19 C15-630-JPD, 2015 WL 10713977, at *6 (W.D. Wash. Oct. 5, 2015); *Wright v.*
20 *Colvin*, No. 13-CV-3068-TOR, 2014 WL 3729142, at *5 (E.D. Wash. July 25,
21 2014); *but see Bryant v. Astrue*, No. C12-5040-RSM-JPD, 2012 WL 5293018, at
*5–7 (W.D. Wash. Sept. 24, 2012).

1 Fourth, the ALJ found there was a long gap in treatment and that Plaintiff's
2 symptoms remained stable during that time. Tr. 27. Medical treatment received to
3 relieve pain or other symptoms is a relevant factor in evaluating pain testimony. 20
4 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3). The ALJ is permitted to consider the
5 claimant's lack of treatment in making a credibility determination. *Burch v.*
6 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). The ALJ observed there is a long gap
7 in treatment from September 2015 to November 2016 when Plaintiff finally returned
8 to follow up with behavioral medicine. Tr. 27; *compare* Tr. 346 (upper GI
9 endoscopy follow up October 2015) to Tr. 402 (behavioral health follow up
10 November 2016). The ALJ noted that it appeared Plaintiff remained stable during
11 that time, Tr. 402, and there is no evidence that Plaintiff's symptoms exacerbated
12 during that time such as emergency or inpatient treatment. Tr. 27. Additionally, the
13 ALJ noted that in November 2016, Plaintiff reported his primary barrier to work is
14 "people" because he has a hard time being around others. Tr. 355. The ALJ
15 observed that the RFC finding accommodates this barrier by limiting social
16 interaction. Tr. 26-27.

17 Plaintiff first argues the ALJ had a duty to inquire about the gap in treatment
18 at the hearing under Social Security Ruling 16-3p, and that the ALJ did not
19 "acknowledge the contemporaneous information about why Plaintiff had a gap in his
20 treatment." ECF No. 13 at 9. It is not clear why the ALJ would have a duty to
21 inquire about the gap which Plaintiff asserts is explained in the treatment record.

Furthermore, SSR 16-30 provides that the ALJ "may" need to inquire about a lack of
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1 treatment; here, the ALJ reasonably considered the record overall and accounted for
2 Plaintiff's social anxiety in the RFC, so no inquiry was required.

3 Plaintiff next argues the ALJ failed to consider that the gap in treatment was
4 explained by his statements that he had been sick, worsening of anxiety symptoms,
5 and four months of convincing himself to return to treatment. ECF No. 13 at 9-10
6 (citing Tr. 402). According to Plaintiff, the record as a whole demonstrates the gap
7 in treatment was due to anxiety. ECF No. 13 at 10. To the contrary, Plaintiff's
8 citation to one record does not demonstrate that "as a whole" the record supports the
9 conclusion that the gap in treatment was the result of his anxiety. The ALJ
10 considered the context of the gap in treatment and reasonably concluded the RFC
11 finding accommodates the social anxiety supported by the record. Furthermore, to
12 the extent the record as a whole could be seen to conflict or be ambiguous on this
13 issue, it is the ALJ's duty to resolve the ambiguity. *See Morgan v. Commissioner*,
14 169 F.3d 595, 599-600 (9th Cir. 1999). This is a clear and convincing reason
15 supported by substantial evidence.

16 Fifth, the ALJ found there was noncompliance with treatment
17 recommendations regarding marijuana use. Tr. 28. It is well-established that
18 unexplained non-compliance with treatment reflects on a claimant's credibility. *See*
19 *Molina*, 674 F.3d at 1113-14; *Tommasetti*, 533 F.3d at 1039; *Orn v. Astrue*, 495 F.3d
20 625, 638 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); *Fair*
21 *v. Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989). The ALJ observed that Plaintiff
continued to use marijuana despite the advice of treating providers to reduce or

1 eliminate marijuana usage. Tr. 28. In 2014, his treating physician “[e]ncouraged
2 him to cut back and stop his marijuana use if possible since any substance abuse can
3 cloud the diagnosis of psych issues. The withdrawal from marijuana may lead to
4 increased anxiety for a period of time but the marijuana itself can contribute to
5 anxiety and paranoid thoughts.” Tr. 311. Notwithstanding the advice of his doctor,
6 in April 2015 he was still using marijuana, Tr. 294, and in September 2015 he stated
7 he would continue using marijuana, Tr. 378. On October 1, 2015, he indicated he
8 had been off marijuana for about three weeks and his physician recommended he
9 remain off of it “to avoid clouding his clinical picture.” Tr. 297. However, in
10 November 2016 he reported that while he had cut back on his cannabis use but was
11 still using “two or three times weekly for treatment of anxiety.” Tr. 354. Seven
12 days later, he told a different provider that he “has essentially stopped using
13 marijuana” because he could not afford it. Tr. 402. In 2018, he indicated that he had
14 been smoking marijuana regularly, he was decreasing his cannabis use, and that he
15 “is aware that using marijuana decreases his motivation as he gets high and does not
16 want to do anything.” Tr. 413. The ALJ’s finding that Plaintiff continued to use
17 marijuana against the advice of his providers is supported by substantial evidence.

18 Plaintiff argues he initially used marijuana to help with his anxiety symptoms
19 while waiting for a diagnosis and that he tried to stop using but went back to
20 marijuana in order to control his symptoms. ECF No. 13 at 11-12 (citing Tr. 297,
21 303, 320, 335, 401-02). Plaintiff’s subjective belief that marijuana helped his
symptoms is insufficient in light of the recommendations of his medical providers

1 documented in the record. This is a clear and convincing reason supported by
2 substantial evidence.

3 **B. Lay Witness**

4 Plaintiff contends the ALJ gave insufficient reasons for giving little weight to
5 the statements from his girlfriend, Alissa B. ECF No. 13 at 12. Ms. B. testified that
6 Plaintiff's main problem is anxiety and described his panic attacks. Tr. 26. She
7 indicated that panic attacks last from one to two hours and Plaintiff is drained for
8 several hours afterward. Tr. 26. He also has "mini panic attacks" every couple of
9 days. Tr. 26-27. She testified that Plaintiff's worst period was from November
10 2014 to April 2015 as he was not able to leave the house for several months. Tr. 27.
11 She has observed that social situations and pressure trigger panic attacks. Tr. 28.
12 Medication and counseling have been helpful. Tr. 28. She testified that she did not
13 believe he could be consistent at work due to his panic attacks. Tr. 28-29.

14 An ALJ must consider the testimony of lay witnesses in determining whether
15 a claimant is disabled. *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053
16 (9th Cir. 2006). Lay witness testimony regarding a claimant's symptoms or how an
17 impairment affects ability to work is competent evidence and must be considered by
18 the ALJ. If lay testimony is rejected, the ALJ "must give reasons that are germane
19 to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing
20 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

21 The ALJ found that Ms. B.'s function report confirmed many of Plaintiff's
reports regarding daily activities and therefore gave it some weight as it verified the

1 “paragraph B” ratings at step three. Tr. 25, 30, 251-58. However, the ALJ gave
2 limited weight to Ms. B.’s other observations. Tr. 29.

3 First, the ALJ noted that although Plaintiff was found to be anxious at
4 appointments, no panic attacks were ever medically observed or verified. Tr. 29.
5 Sometimes a lack of support from medical records is not a germane reason to give
6 little weight to lay witness observations. *Diedrich v. Berryhill*, 874 F.3d 634, 640
7 (9th Cir. 2017); *see also see also Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.
8 2009). “The fact that lay testimony and third-party function reports may offer a
9 different perspective than medical records alone is precisely why such evidence is
10 valuable at a hearing.” *Id.*; *see also Smolen*, 80 F.3d at 1289. While it may be true
11 that no provider observed a panic attack, this is not a sufficient reason for rejecting
12 Plaintiff’s girlfriend’s testimony. Panic attacks are episodic, and it was
13 unreasonable for the ALJ to find that the statements of Ms. B. are unreliable because
14 Plaintiff never happened to have a panic attack during an appointment.

15 Second, the ALJ gave little weight to Ms. B.’s opinion that Plaintiff is unable
16 to work because she is not a vocational expert. Tr. 30. The ALJ noted that Ms. B.
17 indicated that Plaintiff could not work because “most jobs involve customer service
18 and he is unable to do that due to his disorder.” Tr. 258. To the extent Ms. B.
19 testified or commented about vocational characteristics of jobs, the ALJ was correct
20 to disregard the statements. The RFC finding includes a limitation of no work with
21 the public, consistent with the lay witness statement that Plaintiff could not do
customer service, and the vocational expert testified that there are jobs available in

1 significant numbers in the national economy consistent with the RFC. Tr. 26, 30-31.
2 The ALJ's finding is supported by substantial evidence and is germane to the
3 testimony.

4 Third, the ALJ noted Ms. B. testified that medication helped Plaintiff's
5 symptoms, which is one of the clear and convincing reasons given by the ALJ for
6 findings the extent of Plaintiff's symptom claims less than fully reliable. Tr. 27, 29.
7 When lay witnesses' statements are similar to Plaintiff's testimony, the ALJ's valid
8 reasons to discount Plaintiff's allegations apply with equal force to the lay
9 statements. *See Valentine v. Comm'r of Social Sec. Admin.*, 574 F.3d 685, 694 (9th
10 Cir. 2009) (because "the ALJ provided clear and convincing reasons for rejecting
11 [the claimant's] own subjective complaints, and because [the lay witness's]
12 testimony was similar to such complaints, it follows that the ALJ also gave germane
13 reasons for rejecting [the lay witness's] testimony"). Thus, the ALJ's assessment of
14 the Ms. B.'s testimony does not provide a basis for reversing the decision.

15 **C. Medical Opinion**

16 Plaintiff contends the ALJ failed to properly consider the opinion of Dominika
17 Breedlove, Psy.D. ECF No. 13 at 15-19. In August 2017, Dr. Breedlove completed
18 a Mental Source Statement form and assessed marked limitations in the ability to
19 perform activities within in a schedule and maintain regular attendance; the ability to
20 work in coordination with or proximity to others without being distracted by them;
21 the ability to complete a normal workday and workweek without interruptions from
psychological symptoms and to perform at a consistent pace; the ability to accept

1 instructions and criticism from supervisors; the ability to get along with co-workers;
2 and the ability to respond appropriately to changes in the work setting. Tr. 404-06.
3 Dr. Breedlove also assessed marked limitations in the “B criteria” regarding
4 difficulties in maintaining social function and difficulties maintaining concentration,
5 persistence, and pace. Tr. 406. Dr. Breedlove opined that Plaintiff would be off-
6 task 30 percent of the time and would miss four or more days of work per month.
7 Tr. 406.

8 There are three types of physicians: “(1) those who treat the claimant (treating
9 physicians); (2) those who examine but do not treat the claimant (examining
10 physicians); and (3) those who neither examine nor treat the claimant but who
11 review the claimant’s file (nonexamining or reviewing physicians).” *Holohan v.*
12 *Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). “Generally,
13 a treating physician’s opinion carries more weight than an examining physician’s,
14 and an examining physician’s opinion carries more weight than a reviewing
15 physician’s.” *Id.* “In addition, the regulations give more weight to opinions that are
16 explained than to those that are not, and to the opinions of specialists concerning
17 matters relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

18 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
19 reject it only by offering “clear and convincing reasons that are supported by
20 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
21 “However, the ALJ need not accept the opinion of any physician, including a
treating physician, if that opinion is brief, conclusory and inadequately supported by

1 clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (internal quotation marks and brackets omitted). “If a treating or examining doctor’s
3 opinion is contradicted by another doctor’s opinion, an ALJ may only reject it by
4 providing specific and legitimate reasons that are supported by substantial
5 evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-31).

6 The ALJ gave less weight to Dr. Breedlove’s opinion than to the opinions of
7 the state agency psychological consultants, Kent Reade, Ph.D., and Dan Donahue,
8 Ph.D., and to examining psychologist, Thomas Rowe, Ph.D. Tr. 28-29, 81-83, 107-
9 08, 352-60. The ALJ gave weight to most of Dr. Breedlove’s findings of none to
10 moderate limitations on numerous work-related activities, which the ALJ found is
11 consistent with Plaintiff’s overall stability and lack of inpatient treatment, his ability
12 to maintain a long-term relationship, his ability to complete activities of daily living,
13 and his ability to produce artwork and focus on it for hours at a time. Tr. 29 (citing
14 findings at Tr. 25).

15 As to the assessment of marked limitations, the ALJ first found Dr.
16 Breedlove’s opinion is inconsistent with Plaintiff’s demonstrated abilities. Tr. 29.
17 Factors relevant to evaluating any medical opinion include the amount of relevant
18 evidence that supports the opinion, the quality of the explanation provided in the
19 opinion, and the consistency of the medical opinion with the record as a whole. 20
20 C.F.R. §§ 404.1527(c), 416.927(c); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th
21 Cir. 2007); *Orn*, 495 F.3d at 631. The ALJ observed that the marked ratings in the
ability to get along with others and maintaining social functioning are inconsistent

1 with Plaintiff's ability to live with his long-term girlfriend, take his art to art shows
2 or art cafes, and to do errands in public places. Tr. 29, 243-58, 354-55. Similarly,
3 the ALJ found the marked rating in concentration, persistence, and pace is
4 inconsistent with findings of good conversational attention and concentration by Dr.
5 Rowe, whose findings were given great weight by the ALJ. Tr. 29-30, 355.

6 Plaintiff argues the ALJ made an "apples to oranges" comparison, that the
7 activities cited were not relevant to the limitations Dr. Breedlove assessed, and that
8 the ALJ failed to acknowledge that Plaintiff's ability to perform these activities was
9 qualified by Plaintiff. ECF No. 13 at 17-18. Activities involving social and public
10 interaction are relevant to social limitations, and findings and activities involving
11 attention and concentration are clearly related to limitations on concentration,
12 persistence, and pace. See Tr. 25, 29. The ALJ acknowledged Plaintiff's qualifiers
13 regarding social limitations and included a limitation in the RFC finding of no work
14 with the public, but found very little documentation of difficulty involving
15 concentration, persistence, or pace. Tr. 25. These findings are supported by
16 substantial evidence, and this is a specific, legitimate reason for giving less weight to
17 Dr. Breedlove's opinion.

18 The ALJ also found that the assessment does not discuss whether or if Dr.
19 Breedlove considered the impact of the long gap in treatment, the fact that Plaintiff
20 was not taking medication at the time of the assessment, or Plaintiff's ongoing
21 marijuana use. Tr. 29. Plaintiff cites *Thomas*, 278 F.3d at 958, quoting 20 C.F.R. §
416.929(e), and argues the ALJ had an affirmative duty to recontact Dr. Breedlove

1 to resolve any ambiguity. ECF No. 13 at 18. However, 20 C.F.R. § 416.929 was
2 revised after *Thomas*, a 2002 case, and the version of the regulation in effect at the
3 relevant time no longer includes a provision requiring an ALJ to recontact a treating
4 provider. 20 C.F.R. § 416.929 (April 20, 2015 to March 26, 2017). Furthermore,
5 the relevance of each of these factors was previously discussed by the ALJ and was
6 reasonably considered in evaluating Dr. Breedlove's opinion. This is a specific,
7 legitimate reason supported by substantial evidence.

8 CONCLUSION


9 Having reviewed the record and the ALJ's findings, this Court concludes the
10 ALJ's decision is supported by substantial evidence and free of harmful legal error.
11 Accordingly,

12 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is DENIED.

13 2. Defendant's Motion for Summary Judgment, ECF No. 14, is GRANTED.

14 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
15 Order and provide copies to counsel. Judgment shall be entered for Defendant and
16 the file shall be **CLOSED**.

17 **DATED** December 7, 2021.

18 
19 _____
20 LONNY R. SUKO
21 Senior United States District Judge